

### **DETAILED ACTION**

Claims 11-20 are pending.

#### ***Election/Restrictions***

The previous requirement for restriction mailed on November 9 2007 has been vacated due the submission of a preliminary amendment on November 29 2007.

Claims 1-10 were cancelled and claims 11-20 were added in the preliminary amendment. A new requirement for restriction was then required.

Restriction is required under 35 U.S.C. 121 and 372.

This application contains the following inventions or groups of inventions, which are not so linked as to form a single general inventive concept under PCT Rule 13.1.

In accordance with 37 CFR 1.499, applicant is required, in reply to this action, to elect a single invention to which the claims must be restricted.

Group I, claim(s) 10-18, drawn to suspension concentrate.

Group II, claim(s) 19, drawn to process for preparing suspension.

Group III, claim(s) 20, drawn to a method of applying agrochemically active compounds.

An international application should relate to only one invention or, if there is more than one invention, the inclusion of those inventions in one international application is only permitted if all, inventions are so linked as to form a single general inventive concept (PCT Rule 13.1). With respect to a group of inventions claimed in an international application, unity of invention exists only when there is a technical relationship among the claimed inventions involving one or more of the same or corresponding special technical features.

The expression "special technical features" is defined in PCT Rule 13.2 as meaning those technical features that define a contribution which each of the inventions, considered as a whole, makes over the prior art. The determination is made on the contents of the claims as interpreted in light of the description and drawings (if any). Whether or not any particular technical feature makes a "contribution" over the prior art, and therefore constitutes a "special technical feature," should be considered with respect to novelty and inventive step.

The inventions listed as Groups I, II, III do not relate to a single general inventive concept under PCT Rule 13.1 because, under PCT Rule 13.2, they lack the same or corresponding special technical features for the following reasons: The common technical feature in all groups is the suspension concentrate. This element cannot be a special technical feature under PCT Rule 13.2 because the element is shown in the prior art. Schlatter (US PG PUB No. 2002/004004) discloses pesticidal aqueous suspension concentrates. Example 1 discloses concentrates that comprise one or more fungicides, surfactants, water, and additives. The surfactants consist of both dispersants (Pluronic P), and penetration enhancer (Atlox 4894).

During a telephone conversation with Richard Henderson on December 3 2007 a provisional election was made with traverse to prosecute the invention of Group 1, claims 10-18. **Affirmation of this election must be made by applicant in replying to this Office action.** Claims 19-20 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention. Accordingly, claims 10-18 are being examined on the merits herein.

### ***Specification***

The use of the trademark Genapol C 100® (page 4, line 10 and examples), Atlox 4913® (page 4, line 22 and examples), Preventol®, Proxel® (both on page 5 line 20 and examples) has been noted in this application.

It should be capitalized wherever it appears and be accompanied by the generic terminology.

Although the use of trademarks is permissible in patent applications, the proprietary nature of the marks should be respected and every effort made to prevent their use in any manner which might adversely affect their validity as trademarks.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

**Claims 11-12 and 18 are rejected under 35 U.S.C. 102(b) as being anticipated by Schlatter.**

Schlatter is directed to a pesticidal composition in the form of aqueous suspension concentrates. The concentrates comprise a triazole fungicide and surfactants. The composition of Example 2a comprises water, Atlox 4913, Atlox 4894,

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Soprophor 4D384, Pencoazole. Atlox 4913 is the polymer of methyl 2-methyl-2-propenoate and  $\alpha$ -(2-methyl-1-oxo-2-propenyl)- $\omega$ -methoxy-poly(oxy-1,2-ethanediyl).

Atlox 4894 is an alkanolethoxylate. Pencoazole is a triazole. The fungicide is listed as being solid at 25 °C (paragraph 0028). Soprophor 4D84 is a tristyrylphenol-16 EO sulfate ammonium salt.

The dispersant group tristyrylphenolethoxylates is being interpreted broadly as encompassing sulfated salts of tristyrylphenolethoxylate therefore Example 2a is anticipatory for claim 18.

#### **Claim Rejections - 35 USC § 103**

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Applicant Claims
2. Determining the scope and contents of the prior art.
3. Ascertaining the differences between the prior art and the claims at issue, and resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

**Claims 11, 13-15, and 17-18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schlatter.**

### ***Applicant Claims***

Applicant claims a suspension concentrate comprising at least one active compound that is solid at room temperature, at least one alkanolethoxylate, at least one dispersant, water, and optionally one or more additives. The suspension comprises two dispersants. The dispersants are selected from the group consisting of the polymers of methyl 2-methyl-2-propenoate and  $\alpha$ -(2-methyl-1-oxo-2-propenyl)-  $\omega$ -methoxy-poly(oxy-1,2-ethanediyl), tristyrylphenoethoxylates, and propylene oxide/ethylene oxide block. Copolymers having molecular weights between 8000 and 10,000.

The active compounds are tebuconazole or tebuconazole and trifloxystrobin or prothioconazole and fluoxastrobin or trifloxystrobin.

One additional interpretation of tristyrylphenoethoxylates is where the broad genus does not encompass sulfated salts of tristyrylphenoethoxylate. This is the interpretation of tristyrylphenoethoxylate that is being used for the rejection under 35 U.S.C. 103.

### ***Determination of the Scope and Content of the Prior Art (MPEP §2141.01)***

Schlatter is directed pesticidal composition in the form of aqueous suspension concentrates. The concentrates comprise a triazole fungicide and surfactants. The surfactants that are included are tristyrylphenol-ethoxylates (paragraph 0012 and 0013), and ethylene oxide-propylene oxide block polymers having an average molecular weight of 1,000-30,000 (paragraph 0020 and 0021). One preferred combination is a combination of tristyrylphenol-ethoxylates and block-polymer of ethylene oxide-propylene

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oxide (paragraph 0026). The composition comprises fungicides. Those fungicides listed as being suitable includes tebuconazole (paragraph 0028), trifloxystrobin, azoxystrobin (paragraph 0030). Also mixtures of the fungicides are listed as being acceptable (paragraph 0032). Also included in the composition are dispersing agents, one exemplified is Atlox 4913, which is polymers of methyl 2-methyl-2-propenoate and  $\alpha$ -(2-methyl-1-oxo-2-propenyl)-  $\omega$ -methoxy-poly(oxy-1,2-ethanediyl). Other ingredients that may be added include thickening agents, antifreeze agents, defoaming agents, preservatives, buffer, and adjuvants (paragraphs 0039-0045).

***Ascertainment of the Difference Between Scope the Prior Art and the Claims***  
***(MPEP §2141.012)***

Schlatter does not exemplify tebuconazole, trifloxystrobin, azoxystrobin, or the combination of tebuconazole and trifloxystrobin.

Schlatter does not exemplify the triserylphenolethoxylate is not a salt.

***Finding of Prima Facie Obviousness Rational and Motivation***  
***(MPEP §2142-2143)***

While Schlatter does not exemplify the non-salt variety of triserylphenolethoxylate, the non salt variety is clearly contemplated. The formula listed in paragraph 0012 is clearly of the alcohol. Therefore it would have been obvious to one of ordinary skill in the art to use the non-salt variety of triserylphenolethoxylate as it is listed as a suitable surfactant to be used in the concentrate. It would have been obvious to one of ordinary skill in the art to pursue known options within his or her technical grasp, those surfactants listed as being suitable.

It would have been obvious to one of ordinary skill in the art to use different fungicides that are taught in the art as being suitable for pesticides to formulate a pesticidal composition.

As a general principle it is *prima facie* obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose, the idea of combining them flows logically from their having been individually taught in the prior art. See *In re Kerkhoven*, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980) **MPEP 2144.06**.

**Claims 11 and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schlatter in view of Kunz et al. (WO 02/081437).**

***Applicant Claims***

Applicant claims a suspension concentrate comprising at least one active compound that is solid at room temperature, at least one alkanolethoxylate, at least one dispersant, water, and optionally one or more additives. The active compounds are prothioconazole and fluoxastrobin.

***Determination of the Scope and Content of the Prior Art (MPEP §2141.01)***

The teachings of Schlatter are set forth above. Specifically Schlatter is directed to suspension concentrates comprising fungicides, surfactants, dispersing agents, and water.

Kunz et al. is directed to compounds that possess useful plant protecting properties and may be employed in agricultural practice (abstract). Fungicides that are listed include HEC 5725 (proposed common name fluoxastrobin, and JAU 6476 (proposed common name prothioconazole) (page 24, lines 17 and 29).

***Ascertainment of the Difference Between Scope the Prior Art and the Claims***  
***(MPEP §2141.012)***

Schlatter does not specify that the fungicides can be fluoxastrobin or prothioconazole.

***Finding of Prima Facie Obviousness Rational and Motivation***  
***(MPEP §2142-2143)***

It would have been obvious to one of ordinary skill in the art to include fluoxastrobin or prothioconazole in the invention of Schlatter. Fluoxastrobin and prothioconazole are known fungicides and therefore it would have been obvious to use them in a pesticidal composition.

As a general principle it is *prima facie* obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose, the idea of combining them flows logically from their having been individually taught in the prior art. See *In re Kerkhoven*, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980) **MPEP 2144.06**.



***Conclusion***

No claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Abigail Fisher whose telephone number is 571-270-3502. The examiner can normally be reached on M-Th 9am-4pm EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Ardin Marschel can be reached on 571-272-0718 or Cecilia Tsang can be reached on 571-272-0562. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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